

Fair Political Practices Commission
Memorandum

To: Chairman Randolph, Commissioners Blair, Downey, Huguenin, and Remy
From: Luisa Menchaca, General Counsel
Subject: Strategic Plan – Legal Division
Date: September 28, 2005

The purpose of this memorandum is to provide the Commissioners an overview of the Legal Division functions and to make recommendations for updating the Commission's Strategic Plan. Particular sections discussed below following the overview discussion include recommendations.

I. OVERVIEW OF LEGAL DIVISION

The Legal Division is responsible for: (1) interpretation and implementation of the provisions of the Political Reform Act ("Act") through formal opinions and regulations; (2) defending the Commission and the Act in court; (3) responding to requests for advice concerning the Act; (4) providing advice to the Commission and the staff on various topics; (5) assisting with the Commission's educational programs; and (6) serving as in-house counsel to the Commission. Much of the Legal Division's work is mandated by statute. (See §§ 83113(c) and 83114.)¹ To accomplish this work, the Legal Division has 6 attorneys, two support positions, and two attorney/supervisory positions.

Administration, implementation and enforcement of the Act have become increasingly complex. The Act was enacted in 1974, and since then it has been the subject of nine ballot or initiative measures (Prop. 68, 73, 105, 112, 131, 140, 208, 226, and 34) and many other legislative amendments. It is estimated that as of July 2005 the Act has been amended over 230 times, resulting in over 900 changes to specific sections of the Act. This has resulted in many unfunded provisions imposing new duties on Legal Division staff, including the drafting of regulations and responding to increased requests for assistance. However, the Legal Division's staffing level is equivalent to the staffing level of the division in 1988 (9 positions) under the current organizational structure.²

Since 1988, the division staff has worked on the implementation of Proposition 68/73, Proposition 112, Proposition 208, and Proposition 34. Division resources were augmented to

¹ All references are to the Government Code. Section 83113(c) requires the Commission to provide assistance to agencies and public officials in administering the provisions of the Act. Section 83114 provides that any person may request that the Commission provide written advice regarding that person's duties under the Act.

² The legal division staffing as of 1989 is as follows: 16 in 1989, 21 in 1990 and 1991, 16 in 1992, 12 in 1993, 10 in 1994 and 1995, 9 in 1996, 16 in 1997, 15 in 1998 and 1999, 13 in 2000 - 2002, 11 in 2003, and 10 since August of 2004. The source of staffing levels is from the agency's organizational charts and may reflect changes due to organizational restructuring and budget reductions, including layoffs.

implement and defend challenges to Propositions 68/73 and Proposition 208, and to administer surviving provisions, such as the “one bank account rule” of sections 85200 and 85201, the prohibition on mass mailing at public expense of section 89001, the amendment to the definition of lobbyist at section 82039, and the advertisement disclosure provisions contained in sections 84501-84510.

However, generally, implementation for the numerous changes to the Act has been accomplished with existing or depleted resources resulting from budget reductions. For example, the campaign reporting requirements have alone resulted in over 200 amendments to the Act. These statutes have been the subject of opinion requests and ongoing work by the Legal Division and the Technical Assistance Division (“TAD”). As an example, in 1997, SB 658 (*Karnette*) alone made significant changes to Chapter 4 and 6 of the Act, requiring electronic filing of campaign statements. While additional resources were allocated to the Secretary of State’s Office for implementation, the Commission was not funded for the new ongoing task of review, implementation, and enforcement. In addition, implementation of Proposition 34 was done primarily with existing resources. These significant changes to the laws often require the Commission to redirect resources to the campaign area, particularly with the addition of Proposition 34’s state contribution and expenditure limits. Therefore, it is estimated that this campaign workload translates to significant unfunded mandates over the years.

II. LITIGATION

The Legal Division (often with assistance of the Office of the Attorney General) defends lawsuits challenging specific provisions of the Act. The Commission currently has cases pending before both the federal and California courts. Many challenges are constitutional challenges.

Currently, a large part of the division’s litigation work is dedicated to defending the Act’s reporting and disclosure provisions against a challenge under the First and Fourteenth Amendments in *California ProLife Council, Inc. v. Liane Randolph, et al.* The litigation in *ProLife* sometimes absorbs the full time of a Senior Commission Counsel. The Legal Division has other ongoing litigation work, including *Citizens to Save California, et al. v. FPPC*, which become very labor intensive suddenly and for long periods.

Increase in litigation workload also results from election activity, most recently in connection with Proposition 34, the 2003 state recall election, and ballot measure contests. For example, litigation immediately ensued upon the passage of Proposition 34. The lobbyist contribution limit provision (section 85702) resulted in an immediate challenge in *Institute of Governmental Advocates v. FPPC*. Also, the proposition’s voluntary expenditure limits statutes resulted in three litigation matters in superior court in and in the state appellate court (*McClintock v. Shelley, Noreen Evans v. FPPC, et al., and Mimi Walters v. FPPC, et al.*). Most recently, the adoption of regulation 18530.9, pertaining to contribution limits applicable to state candidates, resulted in a challenge to the regulation in the *Citizens* case. The pace of litigation activity continues to increase. Recently, the Commission was served in the case of *Professional Engineers in California Government v. Bruce McPherson, in his official capacity as Secretary of State, the Fair Political Practices Commission, Geoff Brandt, the State Printer, and Lewis K.*

Uhler, Proponent – Proposition 75, Real Parties in Interest, Sacramento Superior Court, Case No. 05CS01122.

Ongoing litigation requires significant resources. Therefore, in recent years, the Commission has requested representation by the Office of the Attorney General, and in the case of the tribal litigation, contracted with outside counsel. However, even when represented by the Office of the Attorney General or outside counsel, Commission staff must be integrally involved to provide expertise in the Political Reform Act. When additional resources are needed to address litigation issues, redirection of attorney resources from other division functions (issuance of advice letters and regulatory work) is necessary. **No staff recommendation in this area is offered.**³

III. REGULATIONS

In order to provide clear guidelines to persons governed by the Act, the Commission is required to promulgate administrative regulations implementing its provisions. (Section 83112.) The process for promulgating regulations requires many hours of research, writing, rewriting, review of comments from interested parties, Commission hearings, deliberation, preparation of a rulemaking file, and finally, dissemination of the policy guidelines. (Also see regulation 18312.)

Statutes added to the Act have spawned numerous regulatory projects. For example, Proposition 34 and SB 34 added, amended, or repealed numerous sections of the Act. The Commission has amended, repealed, or adopted over 50 regulations to implement the provisions of Proposition 34.

Based on estimates as of 1998, the Legal Division handles an average of 40 regulations per year. For example, the Commission handled 50 in 1998, 44 in 1999, 29 in 2000, 47 in 2001, 58 in 2002, 36 in 2003, and 40 in 2004. Most regulations require two commission hearings and many require an interested persons' meeting. On average, the equivalent of two staff positions is dedicated to this function.⁴

The Commission's regulatory agenda is set by the Commission itself. Every calendar year, staff from the Legal, Technical Assistance and Enforcement Divisions convene and, with input from the Commission's Chairman, develop regulatory proposals based on statutory requirements and propose changes to clarify existing policies. Technical changes are also made, for example, to adjust gift limits and the contribution and expenditure limits every two years. The regulatory proposals are presented for public comment, and, after additional input from the public, a regulatory calendar is set for the next year. Adjustments to the calendar are made on a quarterly basis.

Where appropriate, staff develops regulatory proposals to codify Commission advice where similar questions are the subject of repeated requests for written or telephone advice and

³ Attorneys have suggested that two attorneys be assigned per case for training, to ensure a better work product, and to ensure there is a back-up. While this has merit, this is difficult to accomplish with current resources.

⁴ This assumes an average of 60 hours of attorney time per hearing and per regulation.

for information transmitted through fact sheets and manuals. For example, staff found that since the passage of a major “ethics bill” in 1990 instituting the one-year “revolving door” ban, requests for advice in this area significantly increased over time. Therefore, regulations in this area were proposed and adopted in 1998. In addition, the Commission later proposed codification of an opinion regarding the permanent ban, *In re Lucas* (2000) 14 FPPC Ops. 15, that recently resulted in amendments to regulation 18741.1.

Staff expects to continue to utilize the same model described above for developing regulatory proposals in the future. However, staff is cognizant that this is not the only model for rulemaking. For example, should the Commission determine it is appropriate to examine a certain area of the law (such as Chapter 4, relating to campaign reporting) to simplify or delete regulations, this work would need to be done by redirecting resources from other division functions. **No staff recommendation is made at this time to increase time spent on this function for purposes of the Strategic Plan.**

IV. LEGISLATION

The Legal Division often drafts bills and analyzes each bill affecting the Act (whether it is Commission sponsored or not). Depending on the legislative session, the Legal Division may be involved in analyzing 30-40 bills, including amended versions.

The Legal Division also acts as lead on some legislative projects. For example, in October 2004, the Commission considered a staff proposal to dedicate staff resources to the development of a pilot project to provide an advice role for the Commission over Government Code § 1090 et seq., through a multi-year pilot project. The original project studied the possible merger of conflict-of-interest laws that are not currently in the Act into the framework of the Act. The rationale for the proposal was that by moving the provisions into the Act, the Commission could further clarify and implement the sections through its administrative rulemaking process and provide advice to officials attempting to comply. In order to develop major legislative changes, the division must reallocate resources from the regulatory and advice functions. **No changes are recommended at this time.**

V. ADVICE FUNCTIONS

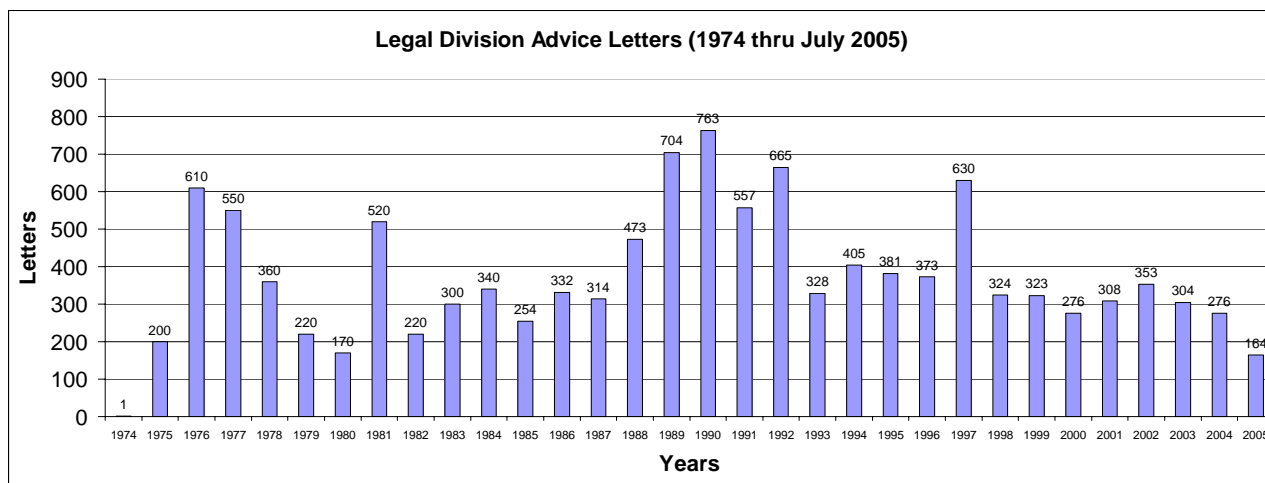
Government Code § 83114 of the Act provides that any person may request that the Commission provide written advice regarding that person’s duties under the Act.⁵ The Commission staff issues both formal and informal advice. Formal advice provides immunity from administrative action and is evidence of good faith in a criminal proceeding. Therefore, even where regulations may reduce the number of requests in a given area, many public officials and candidates seek the Commission’s written advice to obtain the statutory immunity afforded

⁵ The Technical Assistance Division also responds to requests for written advice. All letters are assigned to staff by the agency’s Assistant General Counsel. Any complex issues or ones requiring legal interpretation are assigned to Legal Division staff. Inquiries that require simple clarification of the Act or its reporting requirements are assigned to TAD staff. All requests for written advice are reviewed and approved by the General Counsel and, and letters that present important or complex matters are reviewed by the Chairman.

by section 83114. Commission staff also issues advice letters in the form of “informal assistance,” which provides guidance to requesters, but not the immunity that flows from formal advice.⁶

Section 83114 requires a response within 21 working days, but provides for extensions for good cause. Reductions in personnel have served as a basis for extending the response time in the past. Such staff reductions have also been a constant impetus to maximize efficiency in responding to written requests for advice, which amount to an average of 300 letters per calendar year as shown below.⁷

Table 1



It is estimated that the Legal Division resources dedicated to this function amount to approximately three positions.⁸ As shown above, the number of advice letters handled by the division generally balloons following the passage of ballot measures amending the Act. For example, peaks occurred when Propositions 68/73 and 208 were passed by the voters.

As part of implementation of Propositions 68/73 and 208, division resources increased. As noted earlier, Legal Division staffing increased to 16 in 1989 after the passage of Propositions 68/73 and to 21 in 1990 after Proposition 208 was passed by the voters in 1997. The number of advice letters issued as a result of Proposition 34 did not significantly increase. However, significant staff resources were spent in implementing Proposition 34. In contrast to the

⁶ The Legal Division also provides telephone advice and assists TAD in this function. However, telephone advice is primarily a function of TAD.

⁷ Reviewing the data, the number of requests handled yearly appears relatively stable. However, the adoption of regulations and issuance of updated manuals and fact sheets should have the effect of reducing the number of requests for written advice. It may be that the overall complexity of the Act and education actually result in a steady stream of requests. For example, as public officials gain awareness of their specific obligations under the Act and the consequences of an enforcement action, requests for written advice will stay at current levels.

⁸ It is estimated that one support position is needed for each attorney position. Therefore, this translates to two attorney positions and one support position.

implementation of Proposition 208, where advice and opinion requests were encouraged, with the implementation of Proposition 34, there was a greater emphasis on the development of Question and Answer Fact Sheets and on the development of regulatory proposals which would reflect the Commission's policy determinations.

The Legal Division recommends as a Strategic Plan proposal to reduce the response time for the issuance of advice letters, as illustrated by the response time data shown below.

Table 2- Processing of Advice Letters

| Column 1 | Column 2 | Column 3 | Column 4 |
|--------------------------|--------------------------|---------------------------------------|---|
| Year 2000 | Number of Letters | Percent of Total Handled (276) | Percent of Total Excluding Withdrawals and No Advice (229) |
| 21 Days | 96 | 35 | 42 |
| 42 Days | 83 | 30 | 36 |
| 42+ Days | 50 | 18 | 22 |
| Withdrawals or No Advice | 47 | 17 | N/A |
| Year 2001 | Number of Letters | Percent of Total Handled (308) | Percent of Total Excluding Withdrawals and No Advice (251) |
| 21 Days | 89 | 29 | 36 |
| 42 Days | 81 | 26 | 32 |
| 42+ Days | 81 | 26 | 32 |
| Withdrawals or No Advice | 57 | 19 | N/A |
| Year 2002 | Number of Letters | Percent of Total Handled (353) | Percent of Total Excluding Withdrawals and No Advice (270) |
| 21 Days | 137 | 39 | 51 |
| 42 Days | 73 | 21 | 27 |
| 42+ Days | 60 | 16 | 22 |
| Withdrawals or No Advice | 83 | 24 | N/A |
| Year 2003 | Number of Letters | Percent of Total Handled (304) | Percent of Total Excluding Withdrawals and No Advice (231) |
| 21 Days | 107 | 35 | 47 |
| 42 Days | 54 | 18 | 23 |
| 42+ Days | 70 | 24 | 30 |
| Withdrawals or No Advice | 73 | 23 | N/A |
| Year 2004 | Number of Letters | Percent of Total Handled (275) | Percent of Total Excluding Withdrawals and No Advice (213) |
| 21 Days | 92 | 34 | 43 |
| 42 Days | 70 | 26 | 32 |
| 42+ Days | 51 | 18 | 25 |
| Withdrawals or No Advice | 62 | 22 | N/A |

Utilizing the total letters handled by the division (Column 3), approximately 1/3 of advice letters are issued within 21 working days. When the number of total letters is decreased to exclude letters that are withdrawn or where “no advice” is issued (Column 4), this percentage increases to somewhere between 40-50%.

Staff has taken a number of measures to maximize efficiency. We find that many requesters ask for third party advice or anonymous advice, which takes much staff time and time from requesters who have actual duties under the Act. By ensuring requesters ask “on behalf” of an identifiable person with an actual question or duty, the requests have been processed more efficiently, resulting in withdrawals or “no advice” rendered. Staff also attempts to adhere to requirements in Commission regulations that requesters provide the necessary facts to respond to the letters and that letters do not concern past conduct. Staff also informs requesters of possible delays. For example, the “21-day letter” informs requesters that due to staff shortages, the issuance of a letter may be extended.

Staff also uses standardized formats to the extent possible to streamline the review process. This is particularly useful in the conflict-of-interest area. Approximately 50% of the Legal Division’s written advice relates to disqualification and related statutes. For example, of 353 advice letters generated in 2002, 181 related to conflict-of-interest laws alone. In 2003, of 304 advice letters, 173 related to conflict-of-interest issues and in 2004, of 275 letters, 130 were conflict-of-interest letters. This often requires complicated analysis of disclosure and conflict of interest code issues.

As noted above, a goal in this category would be to increase the number of advice letters issued within 21 working days. This would require an increase in staff time dedicated to the advice letter function.⁹ During the last year, staff attempted to do that by reducing the number of regulatory proposals submitted to the Commission. However, due to occurrence of urgent unanticipated issues and new staff, it has not been possible to reduce the regulatory workload of the division by a significant amount. New attorneys also often need more lead time to complete regulation projects. It is also possible that the statutory mandate of 21 working days does not match up to existing resources when other division responsibilities are taken into account. **Therefore, the Commission may want to consider statutorily extending the required response time. However, other options may be available. For example, informal assistance may be eliminated altogether.**¹⁰ Increased retention of staff would also increase the number of experienced staff which can handle more complex work or complete simple assignments more quickly and with greater ease.

⁹ In the agency’s budget change proposal for next year, the Legal Division has requested an augmentation of three attorneys and two support positions to further this goal.

¹⁰ Staff has been successful in reducing the number of informal requests. For example, in 2002, of 270 letters issued, 102 were issued as informal assistance versus formal written advice. In 2004, of 213 letters issued, 64 were issued as informal assistance. Eliminating informal assistance may result in more expeditious handling of formal requests.

VI. FORMAL OPINIONS

The Commission may issue formal opinions to persons whose duties under the Act are in question. (Section 83114.) These formal Commission opinions are published, and often cited as precedent. Since 1990, the Commission has issued 12 formal opinions of which 10 have been issued in the last 5 years. Many of the opinions become regulation projects as well. The opinion process provides a method for the staff to render advice consistent with the Commission's policies and for the public to determine the Commission's interpretation on particular matters. **No recommendations are made for this category.**

VII. PUBLIC INFORMATION: FORMS, MANUALS AND PUBLICATIONS; ANNUAL PUBLICATION OF THE ACT; AND SEMINARS

The Commission has established, by regulation, a public review process for the formulation and amendment of forms and manuals. "Interested persons" meetings are held to review draft forms and manuals prior to consideration and adoption by the Commission. Legal review of informational pamphlets, fact sheets, the Act (as published by the Commission annually), campaign/lobbyist manuals, and forms developed by the TAD for conformance with existing laws and Commission regulations and policies is necessary. The Legal Division also spends time reviewing the revised Act which is issued annually. Division staff also provides educational seminars to the public. In recent years, this educational component has been downsized due to the costs of travel and resource time to prepare for educational seminars.

Division staff believes that over time, this has resulted in less exposure to the division's work. For example, educational seminars are a good way to let the public know about the Commission's educational components. Although this may actually result in an increase of requests for written advice, this is a component that serves the general public.

Division staff recommends that the Commission increase its educational components. It is proposed that the Commission publish reports on research topics to evaluate the efficacy of current law. For example, the Commission could evaluate the progress of Proposition 34 and other reforms. This takes long-term planning and dedication of time to work that may not immediately result in a work product. The Commission could also have travel funds specifically earmarked for public education.

VIII. IN-HOUSE COUNSEL/SUPPORT FOR OTHER DIVISIONS

The Legal Division serves as in-house counsel for the Commission and the other divisions. This includes: (1) review of written and telephone advice provided by the TAD; (2) review of requests for information under the Public Records Act; (3) preparation of staff memoranda regarding enforcement matters subject to review or adjudication by the Commission; and (4) handling of personnel matters.

The Legal Division provides internal advice regarding appropriate interpretation and application of the Act to facilitate this role. The Commission has instituted weekly advice request meetings to provide an opportunity to discuss complex or unique issues of law, and give

direction to professional staff as they advise affected parties and enforce the law. These meetings include representatives from TAD, enforcement, legal, and outside agencies involved in political reform issues, such as the Franchise Tax Board.

The Legal Division has also worked on the updating of policies and procedures, as directed by the Executive Director and/or the Chairman. For example, the division has worked on the retention policy, development of a sexual harassment policy, and updated the incompatible activities statements. However, other division policies need to be updated to ensure compliance with state laws and policies. **It is recommended that the Legal Division dedicate resources to this function next year, such as updating the agency's grievance and employment policies.**

The Assistant General Counsel also currently spends considerable time in handling personnel matters that may have been previously handled by the Department of Personnel Administration. **The division plans to continue serving the Commission in this capacity.**

IX. MANAGEMENT OF DIVISION

Critical to the implementation of the division's work is management of the division staff. Following are recommendations for inclusion in the Commission's Strategic Plan that have been formulated with staff input:

Training – Training of staff has been very limited in recent years due to lack of resources. This is particularly critical in the handling of litigation as it affects staff retention and the quality of the work product. **It is recommended that additional and specific resources be dedicated for continuing education of attorneys and of support staff. It is also recommended that ongoing training be provided in personnel/employment law to keep attorneys handling these matters abreast of the ever evolving body of law.**

Retention – Upward mobility beyond the Staff Counsel level is very limited for attorneys since the staff ratio between Staff Counsel and Senior Staff Counsel is 55%. **It is recommended that the Commission continue its efforts to lift this cap.**

Staff Support – The division has two support positions for 8 attorney positions. This results in very limited staff support and in attorneys doing some of their own clerical work, which is not an efficient use of resources. It also results in low morale for all staff. Limited staff support also affects the overall maintenance of division operations. For example, it is difficult to keep library resources updated, and ongoing maintenance of the rulemaking, litigation, and advice letter files becomes challenging. **It is recommended that the Commission continue its efforts to augment support positions in the Legal Division.**

Attorney Evaluations – In 1998, the State Auditor noted that the division should implement better methods for tracking attorney time by function and establish performance benchmarks. The division has instituted a "time slips" method to track the amount of staff time spent on projects such as on advice letters, litigation, and regulations. Attorneys record on a daily basis time spent on projects at increments of one hour. However, this is not an automated system, and

it cannot alone serve as an evaluation method for management. Part of the evaluation process includes completion of annual evaluations, establishment of timelines for specific projects, and review of work through periodic reviews of all projects. **It is recommended that management continue to explore various methods for staff evaluation.**

LM:stratplanlegaloct2005.doc